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IN THE

Supreme Court of the United States

NATIONAL COALITION TO SAVE OUR MALL,
WORLD WAR II VETERANS TO SAVE THE MALL,
COMMITTEE OF 100 ON THE FEDERAL CITY,
AND D.C. PRESERVATION LEAGUE,

Petitioners,

v.

GALE NORTON, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, COMMISSION OF FINE ARTS,
NATIONAL CAPITAL PLANNING COMMISSION, AND
AMERICAN BATTLE MONUMENTS COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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6 1 pp

QUESTION PRESENTED

Whether Public Law 107-11, 115 Stat. 19, "An Act to expedite the construction of the World War II memorial in the District of Columbia," which was passed by Congress for the express purpose of retroactively stripping the federal district court of jurisdiction over a pending lawsuit challenging the construction of the World War II Memorial, violates the constitutional principle governing the separation of powers between Congress and Article III Courts set forth in United States. v. Klein, 80 U.S. 128 (1872), by precluding the federal court from exercising its constitutionally assigned function of interpreting and applying the laws made by Congress, including Public Law 107-11 itself.

PARTIES TO THE PROCEEDING

The parties are:

Petitioners: National Coalition to Save Our Mall, World War II Veterans to Save the Mall, Committee of 100 on the Federal City, and D.C. Preservation League

Respondents: Gale Norton, Secretary, in her capacity as Secretary of the U.S. Department of the Interior, the National Park Service, the Commission of Fine Arts, the National Capital Planning Commission, and the American Battle Monuments Commission.

CORPORATE DISCLOSURE STATEMENT

Each of the Petitioners are non-stock corporations or organizations, and none of the Petitioners have a parent corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Coalition to Save Our Mall, World War II Veterans to Save the Mall, Committee of 100 on the Federal City, and D.C. Preservation League hereby petition this Court for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 6, 2001.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 269 F.3d 1092 (D.C. Cir. 2001), and is reprinted in the Appendix, at 1a-9a. The decision of the United States District Court for the District of Columbia is reported at 161 F. Supp.2d 14 (D.D.C. Aug. 16, 2001), and is reprinted in the Appendix, at 10a-31a. The order denying Petitioners' request for rehearing *en banc* is reprinted in the Appendix, at 33a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered on November 6, 2001. On December 21, 2001, Petitioners filed a timely request for panel rehearing and rehearing *en banc*. The petitions for panel rehearing and rehearing *en banc* were denied by orders dated February 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Article III, § 1 provides, in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Public Law 107-11,115 Stat. 19 (May 28, 2001), provides:

> SECTION 1. APPROVAL OF WWII MEMORIAL SITE AND DESIGN.
>
> Notwithstanding any other provision of law, the World War II memorial described in plans approved by the Commission of Fine Arts on July 20, 2000 and November 16, 2000, and selected by the National Capital Planning Commission on September 21, 2000 and December 14, 2000, and in accordance with the special use permit issued by the Secretary of the Interior on January 23, 2001, and numbered NCR-NACC-5700-0103, shall be constructed expeditiously at the dedicated Rainbow Pool site in the District of Columbia in a manner consistent with such plans and permits, subject to design modifications, if any, approved in accordance with applicable laws and regulations.
>
> SECTION. 2. APPLICATION OF COMMEMORATIVE WORKS ACT.
>
> Elements of the memorial design and construction not approved as of the date of enactment of this Act shall be considered and approved in accordance with the requirements of the Commemorative Works Act (40 U.S.C. 1001 et seq.).

SECTION. 3. JUDICIAL REVIEW.

> The decision to locate the memorial at the Rainbow Pool site in the District of Columbia and the actions by the Commission of Fine Arts on July 20, 2000 and November 16, 2000, the actions by the National Capital Planning Commission on September 21, 2000 and December 14, 2000, and the issuance of the special use permit identified in section 1 shall not be subject to judicial review.

The Commemorative Works Act, 40 U.S.C. §§ 1001, 1007, is reprinted in pertinent part in the Appendix at 34a-35a.

The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), reprinted in pertinent part in the Appendix, at 36a-38a.

The National Historic Preservation Act, 16 U.S.C. § 470f, is reprinted in the Appendix, at 40a.

The Federal Advisory Committee Act, 5 U.S.C. App. II, Sec. 10(a), is reprinted in pertinent part in the Appendix, at 40a.

SUMMARY

At issue in this case is the constitutionality and interpretation of Public Law 107-11, 115 Stat. 19, "An Act to expedite the construction of the World War II Memorial in the District of Columbia," which was passed by Congress and signed into law by the President in May 2001. This law was passed for the express purpose of withdrawing the jurisdiction of the federal courts over a pending lawsuit filed by Petitioners in October 2000, challenging the various agency decisions approving the location and design of the World War II Memorial on the National Mall in Washington, D.C.

Section 3 of Public Law 107-11 retroactively strips the federal district court of jurisdiction over Petitioners' pending lawsuit, thereby precluding the court from exercising its constitutionally assigned function of interpreting the laws made by Congress, including Public Law 107-11 itself. In doing so, Congress has arrogated to itself the essential function of interpreting and applying the laws of Congress to pending cases. As a result, Public Law 107-11 violates the constitutional principle governing the separation of powers between Congress and the federal judiciary set forth in United States. v. Klein, 80 U.S. 128 (1872).

The D.C. Circuit decision failed to apply or understand this Court's decision in U.S. v. Klein, which is controlling precedent in this case. If allowed to stand, the D.C. Circuit's decision will establish an unlimited precedent for future extra-judicial actions by the legislative and executive branches to dispose of cases pending before the federal judiciary, against which the Courts and aggrieved parties would have no recourse. Such a result would undermine the U.S. Constitution's system of checks and balances by encroaching on the functions assigned to the federal judiciary by Article III of the U.S. Constitution.

STATEMENT OF THE CASE

A. Factual Background.

In a series of decisions made between 1995 and 2000, the Department of the Interior and National Park Service, the Commission of Fine Arts, the National Capital Planning Commission, and the American Battle Monuments Commission (collectively, "the Government"), approved the location and design of a new World War II Memorial at the Rainbow Pool at the east end of the Lincoln Memorial Reflecting Pool at the great cross-axis of the National Mall in

Washington, D.C. The approved Memorial design calls for the destruction of the historic Rainbow Pool and the creation of a football-field-size walled plaza, enclosing the Mall's historically open space with enormous walls, 56 seventeen-foot-high granite pillars, and four-story-high triumphal arches. Plans for the Memorial also include a ranger station, a new roadway, and public restrooms.

The World War II Memorial's location on the dedicated Lincoln Memorial grounds will have serious and unresolved adverse effects on the preeminent historic and cultural character of the National Mall, and forever block free public assemblies at the Rainbow Pool site, which is historically associated with demonstrations for civil rights and other civic and patriotic activities. As the federal Advisory Council on Historic Preservation determined in September 2000, in formal comments to the Secretary of the Interior:

> The National Mall is a site unique in American history. It is an architectural and landscape expression of great beauty, rich with historical association. But more than that, it has come to symbolize our Nation's democratic ideals. Its open vistas and traditional uses have enabled it to serve as truly common ground for all Americans. . . . Certain adverse effects of this proposal became inevitable upon its selection: the demolition and reconstruction of the Rainbow Pool, the dedicated use of existing open spaces in the premier historic landscapes, and permanent alteration of significant vistas and views of the McMillan Plan, in particular the axial vista from the Washington Monument to the Lincoln Memorial.

On October 2, 2000, Petitioners filed an action in the U.S. District Court for the District of Columbia challenging the Government's decisions in approving or recommending the

approval of the location and design of the new World War II Memorial, based on federal question jurisdiction, 28 U.S.C. § 1331. The lawsuit alleged, among other things, that the various agency decisions approving the Memorial had completely disregarded the stringent standards for protecting the National Mall's central reserve, established by the Commemorative Works Act of 1986, as amended, 40 U.S.C. § 1007.[1]

On February 28, 2001, Petitioners filed a motion for a preliminary injunction to enjoin the Government from executing a contract to construct the World War II Memorial. On March 8, 2001, the district court granted Petitioners' request for a temporary restraining order, preventing the government from removing or damaging any of the historic Olmsted elms flanking the Rainbow Pool site of the World War II Memorial. Consideration of the pending motion for a preliminary injunction was then stayed at the request of the Government, following the decision by one of the Defendant agencies – the National Capital Planning Commission – to reconsider its prior approval of the Memorial, and the Government's agreement to refrain from any steps to proceed with construction of the Memorial in the interim.

Soon after the litigation was stayed, Congress passed legislation, signed by the President on May 28, 2001. See Pub. L. 107-11, 115 Stat. 19 (May 28, 2001) ("Pub. L. 107-11"). On May 29, 2001, the day after the President signed the bill into law, the Government filed a motion to dismiss Petitioners' lawsuit. The Government argued that Public Law 107-11 withdrew the Court's jurisdiction over the entirety of

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[1] This lawsuit also alleged violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C), the National Historic Preservation Act, 16 U.S.C. § 470f, and the Federal Advisory Committee Act, 5 U.S.C. App. II, Sec. 10(a).

Petitioners' lawsuit by precluding judicial review of all administrative decisions concerning the location and design of the World War II Memorial.

B. Decisions Below.

By Memorandum Opinion dated August 16, 2001, the district court granted the Government's motion to dismiss the case. The district court held that Section 3 of Public Law 107-11 provides "clear and convincing evidence that Congress intended to preclude court review of those agency decisions concerning the location and design of the WWII Memorial." National Coalition to Save Our Mall v. Norton, 161 F. Supp.2d 14, 18 (D.D.C. 2001). App. 16a. The Court then rejected the Petitioners' argument that Congress' action violates the constitutional separation of powers principle articulated in United States v. Klein, 80 U.S. (13 Wall.) 128 (1872)

The Petitioners appealed this decision, and filed a motion to enjoin construction of the Memorial until this appeal could be heard. The Court of Appeals for the D.C. Circuit denied Petitioners' motion for an injunction pending appeal. At the same time, the Court of Appeals directed that the case be set for oral argument solely on the question of whether Public Law 107-11 violates constitutional separation of powers restrictions. The Court did not permit the parties to submit any additional briefs on this issue.[2]

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[2] As a result, the D.C. Circuit's decision on the merits had the benefit of only the very brief legal memoranda submitted in connection with Petitioners' motion for an injunction pending appeal. Because these filings also addressed equitable and statutory arguments, only three pages of legal argument in Petitioners' memoranda addressed the important constitutional argument to which the D.C. Circuit's decision was ultimately devoted.

By decision dated November 6, 2001, a panel of the D.C. Circuit affirmed the district court's dismissal of the Petitioners' lawsuit, holding "We find that [Public Law 107-11] withdrew our subject matter jurisdiction over the [Petitioners'] statutory claims, and therefore that we lack jurisdiction to entertain them." National Coalition to Save Our Mall v. Norton, 269 F.3d 1092, 1096 (D.C. Cir. 2001). App. 3a-4a. Petitioners motion for panel rehearing and petition for rehearing *en banc* were denied by the Court of Appeals on February 6, 2002.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Conflicts with this Court's Decision in United States v. Klein, Which Bars Congress From Directing the Outcome of A Pending Case By Retroactively Withdrawing the Court's Subject Matter Jurisdiction.

The constitutional parameters of Congress' authority to manipulate the jurisdiction of federal courts over pending cases is set forth in United States v. Klein, 80 U.S. 128 (1872). The congressional legislation at issue in Klein changed the rule of law concerning the effect of a presidential pardon, which had previously been considered evidence of loyalty in an action to recover property seized during the Civil War, to instead constitute evidence of disloyalty in such an action. In addition, the legislation also provided that "in all cases where judgment shall have been heretofore rendered in the court of claims in favor of any claimant, on any of the proof of loyalty then such as is above required and provided, ... the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction." Klein, 80 U.S. at 141-44. This Court found that this statute was an unconstitutional congressional usurpation of the judicial power to adjudicate cases or controversies.

The decision of the Court of Appeals, which conceded that it viewed the "exact meaning" of Klein as "far from clear," National Coalition to Save Our Mall v. Norton, 269 F.3d at 1095 (App. 6a), evidences a fundamental misunderstanding of both the facts and the holding in Klein. For example, the Court of Appeals erroneously distinguished Klein from the present case on the grounds that the legislation in Klein directed the outcome of a pending case "without amending the substantive law." Id. at 1096. App. 8a. In fact, the legislation at issue in Klein, like Public Law 107-11, both changed the applicable law, and then, through a retroactive withdrawal of jurisdiction, precluded the court from any role in interpreting the new law or applying it to the pending case. Thus, Klein is controlling precedent in this case.

The Court of Appeals erred in conflating Section 1 and Section 3 of Public Law 107-11 in its analysis of whether the law violates separation of powers principles. In fact, the two Sections must be viewed separately in order to understand the constitutional flaw of Public Law 107-11. Section 1 directs a change in law, stating that, "[n]otwithstanding any other provision of law, the World War II Memorial . . . shall be constructed expeditiously at the Rainbow Pool site, subject to design modifications, if any, approved in accordance with applicable laws and regulations." Section 3, however, goes a crucial step further and provides that the various agency decisions approving the location and design of the World War II Memorial, decisions that were the subject of the pending lawsuit, "shall not be subject to judicial review," thereby barring the court from interpreting Section 1 or applying it to Petitioners' case.

As the Court of Appeals properly recognized, Congress can of course change the laws in a manner that affects the outcome of a pending case: Klein "cannot be read as a

prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro-government outcome." National Coalition to Save Our Mall v. Norton, 269 F.3d at 1096 (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (App. 7a); see also Robertson v. Seattle, 503 U.S. 429 (1992) (finding legislation constitutional where it effects "a change in law, not specific results under old law.").

However, while these decisions make clear that Congress may alter substantive law to affect the outcome of a pending case, Klein provides that Congress must allow the courts to exercise their essential function of interpreting and applying the change in law. Here, Congress went beyond merely changing the law that previously applied to the World War II Memorial, and also precluded the Court from applying or interpreting the scope or intent of this new law to Petitioners' pending case. Because Section 3 prevents the court from even determining what the requirements of Section 1 are and whether they have been met, Congress has in effect decided the case itself. This is precisely the outcome found to violate separation of powers principles in U.S v. Klein.

Accordingly, the Court of Appeals erred by viewing Public Law 107-11 in its entirety as a permissible exercise of Congress' power to amend the substantive law pertaining to the World War II Memorial. Section 3 is manifestly nothing more than a jurisdiction-stripping provision that, by definition, cannot constitute a change of law. Rather, its sole function is to prevent the courts, in a pending case, from interpreting and applying the new law, in contravention of the principles set forth in U.S. v. Klein.

II. Considered Apart from Section 3, Section 1 of Public Law 107-11 Would Not Have Preempted All the Claims Asserted in Petitioners' Lawsuit.

The ultimate outcome of the litigation would not necessarily have been the same if Section 3's jurisdiction-stripping provision had not barred the courts from interpreting the statutory language and legislative history of Section 1 of Public Law 107-11. The legislative text of Section 1, on its face, does not clearly dispose of all of the claims in Petitioners' lawsuit. While Section 1 purports to expedite the construction of the Memorial, "notwithstanding any other provision of law," the legislative text itself plainly indicates that Congress did not intend for the Memorial to be exempted from all applicable laws and regulations. Rather, Section 1 contains a savings proviso that specifically acknowledges the continued applicability of some (albeit unspecified) "laws and regulations," normally followed during the course of a project's development and construction, which may require "design modifications" to the Memorial.[3]

Section 1 fails to specify which laws remain applicable and which are no long applicable because they might stand in the way of "expeditious" construction, and which laws that might require "design modifications" remain applicable. However, a plain reading of the text of Section 1 suggests that Congress intended to exempt the World War II Memorial from substantive legal requirements that might otherwise bar construction at the selected site, such as the Commemorative Works Act, 40 U.S.C. § 1007(b), while procedural laws that

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[3] For example, the Government has conceded that laws such as the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, remain applicable to the World War II Memorial, which will require the excavation, treatment, and disposal of arsenic contaminated soil and groundwater.

might result in design modifications remain applicable.

By contrast, the view expressed by the Court of Appeals that because Section 1's savings clause referred to design "modifications," it was intended to apply only to decisions that "might *follow* the specified approvals and permits," App., at 5a (emphasis in original), is not supported by the plain language of Public Law 107-11. This interpretation cannot be squared with Section 2 of Public Law 107-11, which expressly provides that the Commemorative Works Act is applicable only to "Elements of the memorial design and construction not approved as of the date of enactment of this Act." If the saving proviso of Section 1 only applied, as the Court of Appeals suggests, to decisions that "might *follow* the specified approvals and permits," then Section 2 would simply be redundant of this provision.

Instead, a fair reading of the statute that gives meaning to both Section 1 and Section 2 is that Congress intended to keep in place laws normally followed during the course of development and construction that might lead to modifications of the Memorial's design, including changes that would lessen the Memorial's impact on the National Mall.[4] The National

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[4] As one legislator stated:

> The bill permits the National Capital Planning Commission to proceed with its plans to view an on-site mock-up of the memorial and to consider modifications to the design that will ensure that the memorial respects the open, historic character of the Mall, that significant vistas are not obstructed, and that the height and mass of this memorial are appropriate for the site.

Cong. Rec. S5262 (May 21, 2001).

Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, a purely procedural statute which Petitioners' lawsuit sought to enforce in connection with the Memorial, is such a law.

There is no principled distinction between design modifications that might be warranted by compliance with the Clean Water Act, which the Government concedes applies, and design modifications that might result from compliance with NEPA. To the contrary, the design modifications required by the Clean Water Act may be quite extensive, due to the need to treat and dispose of large amounts of arsenic-contaminated soils and groundwater removed from the site during excavation.

Indeed, Section 1's savings clause is no different from that interpreted by the Court of Appeals in D.C. Federation of Civic Associations v. Volpe, 434 F.2d 436 (D.C. Cir. 1970). In that case, the Court of Appeals held that a similar savings proviso permitted a lawsuit to enforce environmental laws in connection with a controversial highway project in the District of Columbia to go forward, despite Congress' enactment of legislation containing similar language expediting construction of project "notwithstanding any other provision of law."

The legislative history concerning the scope of what laws remain applicable to the World War II Memorial is, at best, conflicting. While isolated statements from certain members of Congress viewed the purpose of Public Law 107-11 *in its entirety* (*i.e.*, including Section 3) as disposing of the claims asserted in Petitioners' lawsuit, these assertions by and large do not specifically focus on the effect of the substantive amendments to otherwise applicable law enacted by Public Law 107-11.[5]

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[5] For example, one member of Congress explained, "Through sections one *and three*, the site and design for the World War II Memorial

The important point here, however, is that interpreting the scope and applicability of Section 1 to the issues raised in Petitioners' lawsuit, based on the applicable legislative text and history and applying accepted principles of statutory construction, is precisely the function constitutionally assigned to the judicial branch. The constitutional flaw of Public Law 107-11 lies in the fact that, as a result of Section 3's retroactive withdrawal of jurisdiction from the courts, the Courts are foreclosed from performing this essential function.

At bottom, Section 3 reflects Congress' distrust of the courts' ability to interpret the congressional directive in Section 1 and to apply it to the pending case. However, under our system of separation of powers, which provides checks on unlimited power by any one branch of government, Congress *must* trust the courts to give effect to the clear language and intent of new legislation and apply it to pending cases. Congress may not attempt to preempt the courts from exercising this essential judicial function by retroactively stripping the court of jurisdiction over a pending case, without violating the separation of powers requirement of the U.S. Constitution. Review by this Court is warranted due to the clear conflict between the circuit court's decision and this Court's decision in United States v. Klein.

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are finalized, expeditious construction is directed, and the prospect of further delay through judicial challenges or other re-considerations of the selected site and design are eliminated." 147 Cong. Rec. S5261 (May 21, 2001) (emphasis added). App. 17a.

III. The D.C. Circuit's Holding That Section 3 of Public Law 107-11 Does Not Violate Separation of Powers Lacks Support In Any Decisions of This Court or Any Other Court.

The Court of Appeals also erred in finding that Public Law 107-11 is similar to the congressional actions in the two other cases in which this Court addressed the scope of Congress' authority to enact legislation that affects pending cases, Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), and Pennsylvania v. Wheeling and Belmont Bridge, 59 U.S. 421 (1855). See National Coalition to Save Our Mall v. Norton, 269 F.3d at 1096. App. 8a. Those cases, however, are not on point since the legislation involved did not contain any legislative effort to strip the courts of jurisdiction over a pending case, such as that contained in Section 3 of Public Law 107-11, and in the legislation found unconstitutional in U.S. v. Klein.

For example, in Robertson, environmental groups had challenged the U.S. Forest Service's decision to permit timber sales in areas known to contain northern spotted owls, an endangered species. In response, Congress passed new legislation adopting new guidelines for the future management of national forests, and then deemed the Forest Service's management plan for logging in these forests to be "adequate . . . for the purpose of meeting the statutory requirements that are the basis for the consolidated cases" brought by the environmental groups. Robertson, 503 U.S. at 435

While the statute involved in Robertson precluded judicial review of the new management guidelines adopted by Congress, id. at 435, the new law expressly *permitted* the judicial review of the lawfulness of individual timber sales authorized under the new law. Id. at 434. Thus the legislative

text at issue lacked any jurisdiction-stripping provision such as that contained in Section 3 of Public Law 107-11. As a result, this Court held that the congressional action merely "compelled changes in law, not findings or results under old law." Id. at 438-39.[6]

Similarly, the legislation at issue in Pennsylvania v. Wheeling and Belmont Bridge, 59 U.S. 421 (1855), did not attempt to withdraw the jurisdiction of this Court to enjoin a railroad's construction of a bridge across the Ohio River. Instead, the legislation simply declared the bridges to be "lawful structures, . . . anything in any law or laws of the United States to the contrary notwithstanding." Id. This legislation, too, is analogous only to Section 1 of Public Law 107-11. It contained no jurisdiction-stripping provision such as the one found in Section 3, or the one found to violate the separation of powers principle in United States v. Klein.

The present case should also be distinguished from a number of lower court decisions addressing whether federal legislation enacted in response to environmental lawsuits

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[6] The D.C. Circuit posited that the only difference between Pub. L. 107-11 and the legislation in Robertson is that Section 1 of Pub. L. 107-11, which purports to change the rule of law applicable to a single federal project — the World War II Memorial — is narrower than the legislation at issue in Robertson, which involved a broader programmatic change to federal logging policies in 13 national forests. National Coalition to Save Our Mall v. Norton, 269 F.3d at 1096. App. 8a. However, the constitutional deficiency in Pub. L. 107-11 lies not in the fact that Section 1 effects a change in law that is "narrow," *i.e.*, project-specific as opposed to program-specific, or in the retroactive nature of the change in law. Rather, as noted above, the constitutional defect of Pub. L. 107-11 lies in Section 3, which retroactively withdraws the jurisdiction of the courts over the Coalition's pending case, thereby preventing the Court from applying or interpreting this change in law.

violates separation of powers concerns by retroactively exempting the challenged projects from otherwise applicable federal environmental laws. While in those cases, the challenged legislation exempted specific projects from otherwise applicable laws, the legislation did not retroactively strip the federal courts of jurisdiction to review the new law. Instead, in each of those cases, the courts retained their constitutionally assigned function of applying the new federal law.

For example, in Stop H-3 Ass'n v. Dole, 870 F.2d 1419 (9th Cir. 1989), Congress passed legislation to expedite a controversial highway project, the construction of which had been enjoined by a federal court, by exempting the project from the specific federal law that was the subject of the lawsuit. Again, the congressional legislation did not strip the court of jurisdiction to hear the pending legal challenge to the highway project. To the contrary, the Court specifically distinguished the case from U.S. v. Klein, stating "[n]or is this a case in which Congress has passed a law providing that, upon proof of certain facts, a court must summarily dismiss for want of jurisdiction a pending claim based on a federal statute." Stop H-3 Ass'n v. Dole, 870 F.2d at 1438 n. 26. Instead, the Court specifically noted that "the courts retain jurisdiction to review Executive branch compliance . . . wherever that statute applies." Id. at 1437.

Again, the key point of difference is that the legislation in the above cases includes no jurisdiction-stripping provision. Thus, the courts were able to interpret and apply the change in law to the merits of the case. In contrast, Section 3 of Public Law 107-11, by simultaneously withdrawing the court's jurisdiction to decide the pending case, completely prevents the court from exercising its constitutionally-prescribed function of interpreting the scope of Section 1 and applying it to the pending case.

In sum, Congress has overstepped its constitutional bounds in enacting Public Law 107-11, and specifically Section 3, not by changing the rule of law affecting a pending case, but by simultaneously withdrawing the jurisdiction of the federal courts over the pending case, so that the courts are no longer free to exercise their constitutional function under Article III to decide justiciable controversies. No court has ever held that such jurisdiction-stripping provisions are constitutional, and United States v. Klein confirms that they are not. Moreover, in Section 1 Congress clearly contemplates the continued applicability of certain unspecified laws and regulations, which may well include some of the laws at issue in Petitioners' pending lawsuit. The constitutional vice of Section 3 is that it prevents the federal courts from even attempting to interpret the scope of Section 1 and its applicability to the claims raised in Petitioners' pending lawsuit. Review by this Court is warranted and necessary due to this clear conflict with established constitutional principles of separation of powers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 3, 2002

APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 10, 2001 Decided November 6, 2001
No. 01-5290
National Coalition to Save Our Mall, et al., Appellants
v.
Gale A. Norton, in her official capacity as Secretary of the Interior, et al., Appellees

Appeal from the United States District Court for the District of Columbia
(No. 00cv02371)

William T. Mayton argued the cause for appellants. With him on the pleadings was *Andrea C. Ferster*.

R. Justin Smith, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the pleadings were *Andrew C. Mergen, Patricia L. Weiss* and *Sean H. Donahue*, Attorneys.

Before: Sentelle and Tatel, *Circuit Judges*, and Williams, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* Williams.

Williams, *Senior Circuit Judge*: A group of organizations, here collectively called the Coalition, filed suit in October 2000 seeking an injunction against the construction of a proposed World War II Memorial on the National Mall. The defendants were a variety of agencies--the Department of the Interior, the National Parks Service, the Commission of Fine Arts, the National Capital Planning Commission, and the American

Battle Monuments Commission--responsible either for the construction of the Memorial or for some link in the chain of permitting and approval. The Coalition asserted that in approving the design and construction of the Memorial, the defendant agencies violated a variety of statutes: the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), the Commemorative Works Act, 40 U.S.C. § 1001 *et seq.*, the National Historic Preservation Act, 16 U.S.C. § 470f *et seq.*, and the Federal Advisory Committee Act, 5 U.S.C. App. II, § 10(a).

In May 2001, while the case was pending in district court, Congress enacted Public Law No. 107-11, 115 Stat. 19 (2001) (the "Act"), which appears to exempt construction of the Memorial from the possible statutory obstacles and to bar judicial review of agency decisions underlying the construction. The Act's full text is as follows:

> Section 1. Approval of World War II Memorial Site and Design.
> Notwithstanding any other provision of law, the World War II memorial described in plans approved by the Commission of Fine Arts on July 20, 2000 and November 16, 2000, and selected by the National Capital Planning Commission on September 21, 2000 and December 14, 2000, and in accordance with the special use permit issued by the Secretary of the Interior on January 23, 2001, and numbered NCR-NACC-5700-0103, shall be constructed expeditiously at the dedicated Rainbow Pool site in the District of Columbia in a manner consistent with such plans and permits, subject to design modifications, if any, approved in accordance with applicable laws and regulations.
> Sec. 2. Application of Commemorative Works Act. Elements of the memorial design and construction not

> approved as of the date of enactment of this Act shall be considered and approved in accordance with the requirements of the Commemorative Works Act (40 U.S.C. 1001 et seq.).
> Sec. 3. Judicial Review. The decision to locate the memorial at the Rainbow Pool site in the District of Columbia and the actions by the Commission of Fine Arts on July 20, 2000 and November 16, 2000, the actions by the National Capital Planning Commission on September 21, 2000 and December 14, 2000, and the issuance of the special use permit identified in section 1 shall not be subject to judicial review.

Pub. L. No. 107-11. In passing the statute, Congress acted on its October 2000 resolution to ensure that "the completed memorial will be dedicated while Americans of the World War II generation are alive." S. Con. Res. 145, 106th Cong. (2000); see also Declaration of William B. Owenby, Director of Procurement and Contracting, American Battle Monuments Commission ¶ 2 (Aug. 27, 2001) ("Of the sixteen million citizens who served in uniform during World War II only five million are alive today and these veterans are dying at the rate of approximately 1,100 per day.").

The district court dismissed the action, explaining that it lacked subject matter jurisdiction. *National Coalition to Save Our Mall v. Norton*, No. Civ. A. 00-2371(HHK) (D.D.C. Aug. 16, 2001). On appeal the Coalition argues that the statute did not effect such a broad exemption for the Memorial, and that, if its language really did so, it encroached on the powers of the federal courts in violation of the separation of powers principles of Article III.

We find that the Act withdrew our subject matter jurisdiction over the statutory claims, and therefore that we lack

jurisdiction to entertain them. We further find that it does not violate Article III.

* * *

The Coalition first contends that the strong presumption for judicial review of agency decisions, see, e.g., *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), requires us to read the Act as not precluding judicial review of the statutory claims.

But the presumption is only that, and can be overridden by specific language or by clear and convincing evidence of legislative intent. *Id.* at 671-73. It is hard to see how Congress could make it clearer than it has here, providing that "[t]he decision to locate the memorial at the Rainbow Pool site[,] ... the actions [of the Agencies,] ... and the issuance of the special use permit ... shall not be subject to judicial review." Pub. L. No. 107-11, § 3.

Section 3's preclusion of review of the relevant agency decisions, moreover, tracks § 1's direction that the Memorial described in those decisions be "constructed expeditiously" in accordance with the named permits, "[n]otwithstanding any other provision of law." On its face, the phrase demonstrates Congress's clear intent to go ahead with the Memorial as planned, regardless of the planning's relation to pre-existing general legislation. This would be clear even if we disregarded the classical but sometimes forgotten purpose of such a *non obstante* clause, namely, to prevent courts from struggling to harmonize a statute with prior ones in the name of the presumption against implied repeal. See Caleb Nelson, "Preemption," 86 Va. L. Rev. 225, 237-42 (2000).

To counter the language of the Act, the Coalition relies chiefly on *D.C. Federation of Civic Associations v. Volpe*, 434 F.2d 436 (D.C. Cir. 1970). There we held that a bridge

construction project of the Department of Transportation remained subject to pre-existing law despite a statute directing its construction "[n]otwithstanding any other provision of law, or any court decision or administrative action to the contrary." *Id.* at 437-38. But as we stressed in *D.C. Federation*, the statute had a savings clause providing that "[s]uch construction ... shall be carried out in accordance with all applicable provisions of title 23 of the United States Code." *Id.* at 437-38. We found that this left the construction subject to claims based on that title. *Id.* at 447. Public Law No. 107-11, in contrast, contains savings clauses directed entirely to changes in design or planning that might *follow* the specified approvals and permits: "design *modifications*" (§ 1) (emphasis added), and "[e]lements ... not approved as of the date of enactment" (§ 2).

Both the language of § 3, the Act's purpose as shown in § 1, and its overall structure evince an unequivocal intent to cut off judicial review of all the defendant agencies' past actions regarding the Memorial. Barring some constitutional infirmity, we lack jurisdiction over the Coalition's statutory claims.

The Coalition contends that if the Act's language withdrew jurisdiction over their statutory claims, then it infringes on judicial power under Article III. We find no such infringement.

First we note that the Act does not purport to bar our consideration of its own constitutionality. See *Steel Company* v. *Citizens for a Better Environment*, 523 U.S. 83, 98-101 (1998) (holding that, absent special circumstances, a court may not reach a merits issue without having first found that it has jurisdiction). Here, § 3 withdraws jurisdiction only over the "decision to locate the memorial" and "the actions by [various agencies]." Thus, just as Congress's withdrawal of jurisdiction over "decision[s]" of the Veterans' Administration left the

courts free to adjudicate constitutional claims against the VA's enabling statute, *Johnson v. Robison*, 415 U.S. 361, 366-74 (1974), so the Act here does not touch our jurisdiction over its own constitutionality.

The Coalition argues that § 3 violates the principles in *United States v. Klein*, 80 U.S. 128 (1871). That decision dealt with a suit for the proceeds of property seized and sold by the army in the Civil War. The administrator of the deceased prior owner's estate sued under legislation allowing recovery by such owners under proof of loyalty, which the Supreme Court had held was satisfied by receipt of a presidential pardon. After the plaintiff recovered in the Court of Claims, Congress passed another statute, denying such pardons any effect in showing loyalty and providing that acceptance without protest of a pardon referring to the recipient's participation in the rebellion would affirmatively prove *dis*loyalty. Congress further directed that on proof of such a pardon or its acceptance, the Court of Claims and Supreme Court should dismiss the suit for want of jurisdiction. *Id.* at 141-44. The Supreme Court found the purported limit on its jurisdiction invalid and ineffective.

Klein's exact meaning is far from clear. One sure precept is that a statute's use of the language of jurisdiction cannot operate as a talisman that *ipso facto* sweeps aside every possible constitutional objection. Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 368 (4th ed. 1996). In *Klein* itself, the Court noted that the statute was "liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional Power of the Executive." *Klein*, 80 U.S. at 147. As the Coalition poses no constitutional objection to the substance of Public Law No. 107-11, this element of *Klein* is of no concern.

There remains the following language of *Klein*:

> It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction. It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

Id. at 146; see also *id.* at 147 ("Can [Congress] prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.").

These passages cannot be read as a prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure a pro- government outcome. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), while holding that Congress may not legislate to require federal courts to *reopen* suits for money damages after final judgment, *id.* at 240, distinguished between pending cases and final judgments, saying that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly," *id.* at 226 (citing *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801)). A further distinction to the advantage of Public Law No. 107-11 is between damage awards and injunctions. *Miller v. French*, 530 U.S. 327 (2000), held that although an injunction may be a final judgment for purposes of appeal, it is

not the "last word of the judicial department" because any provision of prospective relief "is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in the law." *Id.* at 347; see also *Pennsylvania v. Wheeling and Belmont Bridge*, 59 U.S. 421 (1855) (upholding a statute declaring as lawful a bridge that had been previously adjudicated as an unlawful obstruction of navigation). If Congress has the power to impose new standards for final judgments in the form of injunctions, it must have the power to impose new substantive rules on suits such as the Coalition's, which sought injunctive relief and had not been resolved on the merits when Congress acted.

Further, to the extent that *Klein* can be read as saying that Congress may not direct the outcome in a pending case without amending the substantive law, a proposition on which we express no view, Public Law No. 107-11 presents no more difficulty than the statute upheld in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), as Public Law No. 107-11 similarly amends the applicable substantive law. See *id.* at 441.

Finally, the Coalition suggests that Public Law No. 107-11 is too "narrow," as it affects only the Memorial. In making this argument, the Coalition cites a passage in *Seattle Audubon* in which the Court refused to address the belatedly raised claim that "a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in the pending cases." *Id.* There Congress had responded to ongoing spotted-owl litigation relating to 13 national forests with legislation directing that the various statutes invoked against forestry decisions on the specified areas must be deemed satisfied by compliance with the new statute's provisions. *Id.* at 433-35 & nn. 1-2, 440. Here too Congress's direction addresses

a specific problem, namely, whether specified government decisions about the Memorial complied with prior general legislation.

We find the level of specificity to be unobjectionable. There is no independent objection that this Memorial-specific legislation violates some substantive constitutional provision limiting Congress's power to address a specific problem, such as the ban on Bills of Attainder or (in some instances) the Equal Protection clause. Indeed, the Coalition at oral argument conceded that the legislation would be constitutional had it been passed prior to their bringing suit. In view of *Plaut*, *Miller v. French* and *Wheeling Bridge*, we see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit. This seems particularly sound where Congress is addressing a unique public amenity (or disamenity, depending on one's viewpoint), such as the Memorial or the bridge at issue in *Wheeling Bridge*.

* * *

The judgment of the district court is

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL COALITION TO SAVE OUR MALL, et al., **Plaintiffs,** **v.** **GALE NORTON, Secretary of the Interior, et al.,** **Defendants.**	**Civil Action 00-2371 (HHK)**

MEMORANDUM OPINION

On May 25, 1993, Congress authorized the construction of a memorial in the District of Columbia to honor members of the Armed Forces who served during World War II and to commemorate the United States' participation in that war. See Pub. L. 103-32, 107 Stat. 90, 91 (1993). The act empowered the American Battle Monuments Commission ("ABMC"), in connection with a newly-created World War II Memorial Advisory Board, to select a location for the WWII Memorial, develop its design, and raise private funds to support its construction. On October 25, 1994, Congress approved the location of the WWII Memorial in "Area I" of the District, which generally encompasses the National Mall and adjacent federal land. See Pub. L. 103-422, 108 Stat. 4356 (1994). The ABMC reviewed seven potential sites within Area I and endorsed the Rainbow Pool site at the east end of the Reflecting

Pool between the Lincoln Memorial and the Washington Monument as the final location for the WWII Memorial.[1] Finally, in May, 2001, Congress passed new legislation directing the expeditious construction of the WWII Memorial at the selected Rainbow Pool site. See Pub. L. 107-11, 115 Stat. 19 (2001) (hereinafter "Pub. L. 107-11").

The National Coalition to Save Our Mall, World War II Veterans to Save the Mall, Committee of 100 on the Federal City, and District of Columbia Preservation League (hereinafter "plaintiffs") filed this suit for declaratory and injunctive relief, challenging the actions of the United States Department of the Interior, National Parks Service, Commission of Fine Arts, National Capital Planning Commission, and the American Battle Monuments Commission (hereinafter "defendants") in approving the design and location of the WWII Memorial at the historic Rainbow Pool site in the District. Before the court is defendants' motion to vacate the stay of this case imposed on March 13, 2001, and to dismiss. Upon consideration of the motion, the opposition thereto, and the record of this case, the court concludes that defendants' motion to dismiss must be granted because the court lacks subject matter jurisdiction over plaintiffs' claims.

I. BACKGROUND

Plaintiffs allege that defendants violated the Commemorative Works Act ("CWA"), 40 U.S.C. § 1001 et seq., National Environmental Policy Act ("NEPA"), 42 U.S.C.

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[1] Out of the seven sites examined, the ABMC originally selected the Constitution Gardens area (between Constitution Avenue and the Rainbow Pool) as the location for the WWII Memorial, but later decided to endorse the present Rainbow Pool site.

§ 4332(2)(C), National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f et seq., and the Federal Advisory Committee Act ("FACA"), 5 U.S.C. App. II, § 10(a), in approving the proposed WWII Memorial. Plaintiffs filed a motion for a preliminary injunction on February 15, 2001, and applied for a temporary restraining order ("TRO") on March 8, 2001. At the conclusion of the hearing on plaintiffs' TRO application, the court granted the request, temporarily enjoining defendants from "undertaking any activities to remove or prune trees in connection with the construction of the WWII Memorial at the Rainbow Pool Site on the Washington Mall." National Coalition to Save Our Mall, et al., v. Norton, et al., No. 00-2371 (HHK) (D.D.C. March 8, 2001) (order granting temporary restraining order). The next day defendants filed an unopposed motion to stay the proceedings in this case because "[a] question [had arisen] about the validity of certain NCPC [National Capital Planning Commission] decisions related to the Memorial." Defs.' Mot. to Stay Proceedings and Suspend Scheduling Order ¶ 2 (filed March 9, 2001). At issue was the legitimacy of several votes that former NCPC Chairman Harvey B. Gantt had cast after his term as chairman had expired on January 1, 1999. Defendants' motion to stay proceedings was granted.

On May 28, 2001, the President signed into law legislation directing the expeditious construction of the WWII Memorial at the Rainbow Pool site in the District of Columbia. See Pub. L. 107-11, § 1. The legislation states in its entirety:

> SECTION 1. APPROVAL OF WWII MEMORIAL SITE AND DESIGN.
>
> Notwithstanding any other provision of law, the World War II memorial described in plans approved by the Commission of Fine Arts on July 20, 2000 and November 16, 2000, and

selected by the National Capital Planning Commission on September 21, 2000 and December 14, 2000, and in accordance with the special use permit issued by the Secretary of the Interior on January 23, 2001, and numbered NCR-NACC-5700-0103, shall be constructed expeditiously at the dedicated Rainbow Pool site in the District of Columbia in a manner consistent with such plans and permits, subject to design modifications, if any, approved in accordance with applicable laws and regulations.

SECTION. 2. APPLICATION OF COMMEMORATIVE WORKS ACT.

Elements of the memorial design and construction not approved as of the date of enactment of this Act shall be considered and approved in accordance with the requirements of the Commemorative Works Act (40 U.S.C. 1001 et seq.).

SECTION. 3. JUDICIAL REVIEW.

The decision to locate the memorial at the Rainbow Pool site in the District of Columbia and the actions by the Commission of Fine Arts on July 20, 2000 and November 16, 2000, the actions by the National Capital Planning Commission on September 21, 2000 and December 14, 2000, and the issuance of the special use permit identified in section 1 shall not be subject to judicial review.

Pub. L. 107-11. Contending that Public Law 107-11 precludes judicial review of all administrative decisions concerning the location and design of the WWII Memorial, defendants filed the present motion to vacate the court's stay and dismiss this suit

for lack of jurisdiction.[2]

II. ANALYSIS

Defendants move to dismiss on the grounds that Public Law 107-11 expresses Congress' clear intent to preclude judicial review over the various administrative decisions that are the subject of this suit. While apparently conceding that the new legislation -- if constitutional -- essentially withdraws this court's jurisdiction over most of their claims,[3] plaintiffs

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[2] Before responding to defendants' motion to vacate the stay and dismiss, plaintiffs filed a second application for a temporary restraining order on June 4, 2001. Plaintiffs sought to enjoin defendants from executing certain contracts necessary to begin construction of the WWII Memorial. The court held a hearing on plaintiffs' second TRO application on June 6, 2001, and denied the motion in a bench ruling the following day. In its ruling, the court held inter alia that plaintiffs had failed to show that they would suffer irreparable injury if the requested TRO were not granted and that they were substantially likely to prevail on the merits of the case -- particularly, in light of Public Law 107-11. The court also emphasized that it was making only a preliminary ruling on whether Public Law 107-11 deprives this court of subject matter jurisdiction over plaintiffs' claims. See National Coalition to Save Our Mall, et al., v. Norton, et al., No. 00-2371 (HHK) (D.D.C. June 7, 2001) (order denying second application for a temporary restraining order).

[3] For example, in both their second TRO application and opposition to defendants' motion to dismiss, plaintiffs focus almost exclusively on their argument that the court retains jurisdiction over their NEPA claims. Except when arguing that the new legislation unconstitutionally encroaches upon this

maintain that this court still has jurisdiction over their claims arising under NEPA. First, plaintiffs note that Public Law 107-11 does not mention the National Park Service's decision to forego preparation of an Environmental Impact Statement ("EIS"). Given this fact, plaintiffs suggest that Public Law 107-11 does not repeal, either expressly or by implication, NEPA's applicability to the WWII Memorial. Second, plaintiffs argue that the new legislation violates separation of powers principles by unconstitutionally encroaching on this court's Article III powers. Plaintiffs maintain that Congress has used the new legislation essentially to tell this court how it should rule in this case. Finally, in an argument presented for the time in their opposition papers, plaintiffs contend that "any construction of Public Law 107-11 as exempting the WWII Memorial from NEPA would violate the Equal Protection Clause of the Fifth Amendment by denying to District of Columbia citizens the full environmental disclosures accorded to citizens in the 50 states." Pls.' Opp'n at 20 (capitalization omitted).

A. APA Review

Plaintiffs bring this suit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq. Under the APA, any person "adversely affected or aggrieved" by agency action is entitled to judicial review as long as the agency action is final and there is no other available remedy. Heckler v. Chaney, 470 U.S. 821, 828 (1985) (citing 5 U.S.C. §§ 701,

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court's Article III authority or violates equal protection principles, plaintiffs appear to abandon the notion that this court can review defendants' determinations regarding the final design and location of the WWII Memorial at the Rainbow Pool site. See Pls.' Second Application for a TRO at 4-12; Pls.' Opp'n to Defs.' Mot. to Dismiss at 14-20 ("Pls.' Opp'n").

706). However, this grant of judicial review is limited to the extent that a federal statute "preclude[s] judicial review" or the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1) and (2). The Supreme Court has held that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984). See also Southern Railroad Co. v. Seaboard Allied Mining Corp., 442 U.S. 444, 454-55 (1979); Morris v. Gressette, 432 U.S. 491, 499 (1977). The Court has also held that there must be "clear and convincing evidence" of legislative intent before courts will restrict access to judicial review. Abbott Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967).

Here the plain language of Public Law 107-11 provides clear and convincing evidence that Congress intended to preclude court review of those agency decisions concerning the location and design of the WWII Memorial. In clear and unambiguous language, Public Law 107-11 states that the "decision to locate the memorial at the Rainbow Pool site" and the "actions by the Commission of Fine Arts . . . [,] the National Capital Planning Commission . . . , and the issuance of the special use permit [by the Secretary of the Interior] . . . shall not be subject to judicial review." Pub. L. 107-11, § 3. The legislation also notes that any elements of the memorial design not already approved "shall be considered and approved in accordance with the requirements of the CWA." Pub. L. 107-11, § 2. There appears to be no room within this language to support the notion that the court maintains jurisdiction to review the location and design of the WWII Memorial. Indeed, as this court previously stated, it is difficult to imagine a clearer expression of Congress' intention to preclude judicial review

of these agency decisions.

If such plain language were not enough, the legislative history of Public Law 107-11 provides strong support for defendants' position that Congress intended to preclude all judicial review in this case. During the floor debate on Senate Amendment No. 745, the revised bill that eventually became Public Law 107-11, legislation co-sponsor Senator Stevens of Alaska stated:

> Eight years after Congress authorized the construction of this memorial, and six years from the first of 22 public hearings on its site and design, the memorial's construction remains delayed by a procedural issue involving the National Capital Planning Commission (NCPC), one of the agencies required by law to approve the memorial, and a **lawsuit filed by a small group of opponents**. This legislation would remove those obstacles and require the construction process to promptly go forward.
>
> The legislation accomplishes that goal as follows:
>
> Through sections one and three, the site and design for the World War II Memorial are finalized, expeditious construction is directed, and **the prospect of further delay through judicial challenges or other re-considerations of the selected site and design are eliminated.**

147 Cong. Rec. S5261 (May 21, 2001) (emphasis added). In the House of Representatives, Representative Stump of Arizona, one of the original sponsors of the legislation, echoed a similar sentiment:

> The compromise language [of Senate Amendment No. 745] accomplishes our objectives of declaring the major design elements to be approved by Congress and finalized, thus bringing the bureaucratic delay to an end, and **rendering moot the current litigation brought by the memorial's opponents.**

147 Cong. Rec. H2391 (May 22, 2001) (emphasis added).

Despite this clear legislative history (and equally clear text), plaintiffs continue to argue that this court retains jurisdiction to entertain their suit. Plaintiffs are quick to emphasize that there is a strong presumption favoring judicial review of administrative action. See Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 670 (1986); see also Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967) (noting that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress"). While plaintiffs are correct about this general principle, "[t]he presumption favoring judicial review of administrative action is just that -- a presumption. This presumption, like all presumptions used in interpreting statutes, may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." Block v. Community Nutrition Institute, 467 U.S. 340, 349 (1984). Here, as indicated above, the specific language and specific legislative history of Public Law 107-11 compel the conclusion that Congress intended for its new law to moot this litigation and preclude all judicial review of the WWII Memorial design and location.

B. NEPA Arguments

Recognizing the substantial jurisdictional hurdle they

face, plaintiffs refine their argument averring that Public Law 107-11 does not remove this court's jurisdiction over their specific NEPA claims because the legislation does not mention the National Park Service's decision to forego preparation of an environmental impact study ("EIS"). This argument fails for several reasons. First, as an initial matter, NEPA does not provide a separate cause of action for plaintiffs seeking to enforce its EIS requirements. See Florida Audubon Soc. v. Bentsen, 94 F.3d 658, 665 (D.C. Cir. 1996). In order to raise a NEPA claim, aggrieved plaintiffs must bring their NEPA allegations under a separate statutory scheme -- most typically, the APA. See Lujan v. National Wildlife Federation, 497 U.S. 871, 882-83 (1990). Here plaintiffs' NEPA claims cannot survive unless the court maintains jurisdiction over this suit under a broader statutory scheme like the APA. Yet, as the court has already indicated, Public Law 107-11 expresses Congress' clear intent to preclude judicial review over defendants' final actions, thereby precluding all APA review in this case. See 5 U.S.C. § 701(a)(1) (noting that there is no review of final agency action under the APA if the relevant statute "preclude[s] judicial review"). Given that the court does not have jurisdiction under the APA to entertain plaintiffs' claims, the court also does not have jurisdiction under NEPA to review plaintiffs' specific NEPA arguments.

Second, the overall purpose of NEPA suggests that this court should not entertain plaintiffs' suit. As the Supreme Court has stated, NEPA is designed to ensure that federal agencies are fully aware of the environmental effects of proposed agency action before such final action is taken. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371-72 (1989). NEPA imposes only procedural requirements that are preliminary to final agency action. See id. at 371. Here plaintiffs allege that defendants violated NEPA through their arbitrary and capricious decision not to prepare an

environmental impact statement ("EIS") for the WWII Memorial. But given the preliminary nature of NEPA and its procedural (as opposed to substantive) role in influencing final agency action, it is unclear what import such an EIS would have now given that the agency decisions concerning the design and location of the WWII Memorial are final and not subject to judicial review. Indeed, basic reasoning suggests that if a final agency decision is unreviewable, then those preliminary decisions -- solely intended to influence decision-makers about their final course of action -- are not subject to judicial review either.

Plaintiffs seek to overcome this quandary by arguing that the design and location of the WWII Memorial are really not final because Public Law 107-11 makes allowances for "design modifications." Pub. L. 107-11, § 1. Because the legislation allows for such changes, plaintiffs contend, the court has the authority to require defendants to perform an EIS, if the court finds that such action is required. The main problem with this argument is that plaintiffs are reading the phrase "design modifications" much more broadly than Congress intended. Again, the legislative history provides clear guidance on this issue. Public Law 107-11 co-sponsor Senator Stevens noted during Senate debate that

> **Section one [of the Amendment] also includes a provision regarding design modifications which is solely intended to address the highly unlikely event that a technical impossibility could occur in the course of construction that might require a limited deviation from the selected design.** In light of the careful review the existing plans have already been subject to by the memorial's design, engineering, and construction management professionals, the General Services Administration

> (GSA), the American Battle Monuments Commission (ABMC), the National Park Service (NPS), the Commission of Fine Arts (CFA) and the National Capital Planning Commission (NCPC), **no exercise of this authority is expected.**

147 Cong. Rec. S5261 (May 21, 2001) (emphasis added). Such legislative history compels the conclusion that Congress did not intend its allowance for "design modifications" to include substantial changes to the location and design of the WWII Memorial, as plaintiffs' ultimately desire. Rather, the modifications were intended to address only "the highly unlikely event that a technical impossibility could occur in the course of construction that might require a limited deviation from the selected design." See id. (emphasis added).[4]

The third reason this court lacks jurisdiction over plaintiffs' NEPA claims is because the express language of Public Law 107-11 commands that the WWII Memorial shall be constructed expeditiously "notwithstanding any other provision of law." Pub. L. 107-11, § 1. Our Court of Appeals has interpreted similar "notwithstanding" clauses to indicate

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[4] The comments of Senator Kerry of Massachusetts, cited by plaintiffs, are also not to the contrary. Though not a co-sponsor of the legislation, Senator Kerry stated that the legislation's allowance for "design modifications" will ensure "that the memorial respects the open, historic character of the Mall, that significant vistas are not obstructed, and that the height and mass of this memorial are appropriate for the site." 147 Cong. Rec. S 5262 (May 21, 2001). In any event, such technical changes to the memorial's design (and not its location) would be quite different from the broader changes advocated by plaintiffs.

that the new federal statute "supercedes" or "trumps" other statutes that are inconsistent. See, e.g., Liberty Maritime Corp. v. United States, 928 F.2d 413, 416 (D.C. Cir. 1991) (noting that the 'notwithstanding' clause in the Merchant Marine Act "supercede[s] all other laws"); Saco River Cellular, Inc. v. Federal Communications Comm., 133 F.3d 25, 30 (D.C. Cir. 1998) (noting that a 'notwithstanding' clause in the Paperwork Reduction Act "simply trumps" other statutes). Indeed, it is hard to imagine how Congress could have more clearly expressed its intention that the WWII Memorial be built "notwithstanding" any other law -- including those preliminary requirements under NEPA. See Illinois Nat'l Guard v. Federal Labor Relations Auth., 854 F.2d 1396, 1403 (D.C. Cir. 1988) (noting that the "notwithstanding language of the statute really could not be clearer").

Plaintiffs respond that the "notwithstanding" clause in Public Law 107-11 does not indicate whether Congress intended to repeal NEPA's applicability to the WWII Memorial unless there is an "irreconcilable conflict" between the new legislation and NEPA. See Pls.' Opp'n at 15 (citing In re Glacier Bay, 944 F.2d 577 (9th Cir. 1991)). See also Flint Ridge Development Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 785-93 (1976) (noting that a clear conflict must be found before NEPA gives way to substantive legislation); Izaak Walton League of America v. Marsh, 655 F.2d 346, 367 (D.C. Cir.) (same), cert. denied, 454 U.S. 1092 (1981). Here there is an irreconcilable conflict between requiring defendants to perform a preliminary EIS under NEPA when the ultimate decision, for which the EIS is designed to influence, is final and not subject to judicial review. There is also an irreconcilable conflict between Public Law 107-11's direction that the WWII Memorial be built expeditiously and this court's holding, what is likely to be, lengthy proceedings to determine whether defendants were arbitrary and capricious in not preparing an

EIS. The memorial construction would be further delayed if this court were to remand the case back to the multiple federal agencies involved so that they could revisit whether to perform the EIS. As the legislative history indicates, Congress intended through Public Law 107-11 to end this lawsuit and prevent any such further delays. See 147 Cong. Rec. S5261 (May 21, 2001) (Senator Stevens) ("[T]he prospect of further delay through judicial challenges or other re-considerations of the selected site and design are eliminated.").

C. Constitutional Arguments

Plaintiffs next raise two constitutional challenges to Public Law 107-11. Plaintiffs first contend that the new legislation violates the separation of powers principle articulated in United States v. Klein, 80 U.S. (13 Wall.) 128, 20 L.Ed. 519 (1871). In Klein, the executor of a Confederate estate sought to recover the value of property seized by the United States during the Civil War, which by statute was recoverable if the executor could demonstrate that the land owner had not "given any aid or comfort" to the rebellion. Id. at 131. The Supreme Court had previously held in United States v. Padelford, 9 Wall. 531, 542-43, 19 L.Ed. 788 (1869), that a Presidential pardon satisfied this burden of proving that no such aid or comfort had been given. While the Klein case was pending, however, Congress enacted a new statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. See Klein, 13 Wall. at 133-34. The Supreme Court in Klein found this new statute unconstitutional because it sought to "prescribe rules of decision to the Judicial Department of the government in cases

pending before it." Id. at 146.[5] More recently, the Court has interpreted Klein to stand for the proposition that Congress may not dictate the ultimate decision in a case, which is pending before an Article III court. See United States v. Sioux Nation of Indians, 448 U.S. 371, 404-05 (1980). Here plaintiffs argue that Public Law 107-11 does just that by dictating to this court how it should rule in this pending case. This claim is without merit.

As this court said at the hearing on plaintiffs' second application for a TRO, there is an important difference between Congress telling this court how it should decide a particular case (expressly prohibited by Klein) and Congress withdrawing jurisdiction to decide a particular case (the situation here). With Public Law 107-11, Congress has merely exercised its authority under the APA to dictate what agency decisions are subject to judicial review. See Block v. Community Nutrition Institute, 467 U.S. 340, 345-46 (1984) (holding that an agency action is not reviewable under the APA if the statute precludes judicial review); Heckler v. Chaney, 470 U.S. 821, 828 (1985) (same). There is no Klein separation of powers problem here because Congress has not mandated that this court make a particular finding of fact or conclusion of law with respect to plaintiffs' claims. Moreover, unlike in Klein, Congress here has not tried to use its authority to force the court to rule in favor of the government.[6] Neither has Congress violated other

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[5] See also Miller v. French, 530 U.S. 327, 348-50 (2000) (detailing background of Klein and finding no separation of powers issue where a new statute "simply imposes the consequences of the court's application of the new legal standard").

[6] Plaintiffs reason that by precluding judicial review, Congress has effectively forced this court to rule in favor of the

separation of powers principles, such as vesting review of this court's decision in the hands of the Executive Branch, see Hayburn's Case, 2 Dall. 408 (1792), or reopening a final judgment of this court, see Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225-26 (1995).

Plaintiffs make a second constitutional argument contending that any construction of Public Law 107-11 that exempts the WWII Memorial from NEPA would violate implicit Fifth Amendment equal protection principles by denying District of Columbia citizens the full environmental disclosures accorded to citizens of the 50 states. For support, plaintiffs rely on D.C. Federation of Civic Associations, Inc. v. Volpe, 434 F.2d 436 (D.C. Cir. 1970). In Volpe, various citizen groups sued federal and District of Columbia officials to enjoin the construction of a proposed bridge and federal highways in the District. The suit followed the enactment of Section 23 of the Federal-Aid Highway Act of 1968 ("Section 23"), which directed the District government and the Secretary of Transportation to begin work on such projects not later than 30 days after the date of the statute. The legislation also required the construction to be conducted in accordance with

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government because a dismissal of this suit for lack of jurisdiction has the same practical effect for the government as a judgment on the merits. While plaintiffs are correct that they will not prevail under either scenario, this reality does not mean that defendants have somehow received a favorable judgment on the merits. With the passage of Public Law 107-11, this court will not decide (and the parties will never know) whether defendants were arbitrary and capricious in approving the WWII Memorial design and location.

all applicable provisions of Title 23.[7] The central issue in Volpe then was whether Congress intended Section 23's direction that construction begin within 30 days to repeal the pre-construction requirements mandated by Title 23. See id. at 444-47. The Court of Appeals held that the pre-construction requirements of Title 23 were not repealed and that the defendants must comply with these laws before actual construction could begin. See id. at 447 (Wright, J.); see id. at 448 (Bazelon, J., concurring).

While the above holding formed Part II of the court's decision, plaintiffs rely on dicta from Judge Wright's opinion in Part I, in which Judge Wright discussed whether the defendants' interpretation of Section 23 as to deny District of Columbia residents of Title 23's pre-construction requirements would violate equal protection principles. Judge Wright stated:

> The net effect of Section 23, construed as [defendants] insist it must be, is to divide citizens of the United States affected by road projects into two classes. One small group of citizens, the residents of the District of Columbia who will be affected by the Three Sisters Bridge, is deprived of these important rights to participate in planning the future of the community. The other class, consisting of all residents of the 50 states, still retains these federally guaranteed rights to influence all federally assisted road building. On its face, therefore, appellees' interpretation of Section 23 would result in discrimination

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[7] Title 23 includes several pre-construction requirements that must be met before any federal highways are built. These requirements include holding public hearings as to the design and location of any proposed project and considering the economic and social effects of the project's location and impact on the environment. See 23 U.S.C. § 128(a).

> between the District residents affected by the Bridge and all other residents of the United States affected by highway projects in their localities.

Volpe, 434 F.2d at 439. Relying solely on this dicta, plaintiffs argue that by removing NEPA requirements over the WWII Memorial, Congress has deprived District residents of procedural rights otherwise afforded to citizens of the 50 States.

The first problem with this argument is that it is unclear whether District of Columbia residents even have such an equal protection right to NEPA procedures. The portion of Judge Wright's decision that plaintiffs cite was not joined by any other judge of the appellate panel. As dicta, this language does not constitute the circuit panel's opinion and does not have precedential effect. See, e.g., Critical Mass Energy Project v. Nuclear Regulatory Comm'n, 975 F.2d 871, 876 (D.C. Cir. 1992) ("[C]ircuit precedent is generally established by the majority vote of three circuit judges); Gersman v. Group Health Assoc., Inc., 975 F.2d 886, 897 (D.C. Cir. 1992) ("Binding circuit law comes only from the holdings of a prior panel, not from its dicta."), cert. denied, 511 U.S. 1068 (1994). However, even if such an equal protection right existed under Volpe,[8] the facts of the present case are readily distinguishable from the facts there. Most significantly, the statute at issue in Volpe would have denied District residents of all pre-construction benefits concerning all remaining interstate highways within the District. This broad preclusion is not present here. Public Law 107-11 does not repeal NEPA requirements for all federal projects built in the District, but effectively does so only for the

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[8] The parties have not cited (and the court's own research has not revealed) any case in which a court has held that such an equal protection right exists with respect to federal projects built on federal land.

WWII Memorial. Furthermore, while Volpe involved the taking of District of Columbia parks and land to build federal projects, the WWII Memorial would reside on current federal land, over which Congress has broad and unlimited control under the Property Clause. See U.S. Const. art. IV, § 3, cl. 2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."); see also Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (noting that "the power over the public land thus entrusted to Congress is without limitations").

The second problem with plaintiffs' equal protection argument is that Public Law 107-11 does not specifically discriminate against District of Columbia residents or take away rights enjoyed by other citizens. Concerning equal protection analysis, the Supreme Court has stated that "[t]he equal protection component of the Fifth Amendment prohibits only purposeful discrimination, and when a facially neutral federal statute is challenged on equal protection grounds, it is incumbent upon the challenger to prove that Congress selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Harris v. McRae, 448 U.S. 297, 323, n. 26 (1980) (internal citations omitted). Here there is no reason to believe (and plaintiffs have not alleged) that Congress passed Public Law 107-11 in some attempt to discriminate against District of Columbia citizens. Congress has often exempted state-specific projects from generally applicable federal laws. See, e.g., Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608, 611-12 (E.D. Tenn. 1979) (finding that Congress exempted certain projects of the Tennessee Valley Authority from the Endangered Species Act), aff'd, 620 F.2d 1159 (6th Cir.), cert. denied, 449 U.S. 953 (1980); Friends of the Earth, Inc. v. Weinberger, 562 F. Supp. 265, 270 (D.D.C. 1983),

appeal dismissed without opinion, 725 F.2d 125 (D.C. Cir. 1984) ("To be sure, Congress can and does exempt projects from NEPA") (citing Flint Ridge Development Co. v. Scenic Rivers Assoc. of Oklahoma, 426 U.S. 776, 788 (1976); Izaak Walton League of American v. Marsh, 655 F.2d 346, 367-68 (D.C. Cir.), cert. denied sub. nom., Atchison, Topeka and Santa Fe R.R., 454 U.S. 1092 (1981)).[9]

Moreover, at least one appellate court has held that there is no equal protection violation where Congress exempts a federal project in one state from otherwise applicable environmental compliance requirements such as NEPA. See Stop H-3 Ass'n v. Dole, 870 F.2d 1419 (9th Cir. 1989). In Stop H-3 Ass'n, plaintiffs challenged congressional legislation that ordered the Secretary of Transportation and Hawaii government officials to approve construction of a controversial interstate highway project in Hawaii. The legislation at issue, Public Law 99-591 or "Section 114," specifically stated that the highways should be approved "notwithstanding" other federal, state, and local laws. See id. at 1423. Like plaintiffs here, the plaintiffs in Stop H-3 Ass'n raised an equal protection challenge, arguing inter alia that the new law created an arbitrary classification by denying Hawaii residents the full environmental protections afforded by NEPA and other applicable laws. The Ninth Circuit squarely rejected this view:

> We do not accept appellants' analysis. First, section 114 does not, as appellants believe, rest on a legislative distinction between Hawaii and the other 49 states. Section

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[9] Congress has also removed a federal court's jurisdiction over such projects. See Bald Eagle Ridge Protection Assoc. v. Mallory, 119 F. Supp. 2d 473, 481-84 (M.D. Pa. 2000) (finding that Congress precluded judicial review over administrative action that involved a new interstate highway in Pennsylvania).

> 114 by its terms refers only to the H-3 project. The statute does not exempt all federal highway construction projects in Hawaii from the requirements of section 4(f); rather, it exempts one project located in Hawaii from the 4(f) statutes. Even when we look beyond its terms to its effect, section 114 does not affect the state of Hawaii as a whole, to the exclusion of the rest of the nation. Instead, the effects of section 114 will be felt by any United States citizen whose use and enjoyment of Hawaii's environment is affected by H-3, regardless of that person's state of residence. Thus in depicting citizens of Hawaii as a disadvantaged "class" for purposes of equal protection analysis, appellants include people who will not be affected by construction of H-3, and overlook others who will. In short, it cannot be said that section 114 rests on a state-based classification simply because it refers to a project located in Hawaii.

Id. at1431. This court is persuaded by the Ninth Circuit's analysis in Stop H-3 Ass'n and finds that such reasoning applies with equal force here. Indeed, Public Law 107-11's effect on District of Columbia residents does not appear to be to the exclusion of the rest of the nation. Citizens from all 50 states will visit the completed WWII Memorial, and any adverse effects from the alleged destruction of "significant vistas between the Reflecting and Rainbow Pools and the Washington Monument" will presumably affect all visiting guests. Compl. ¶ 5. Moreover, the alleged environmental harms of which plaintiffs complain will certainly affect the citizens of those states bordering the District and the Potomac River.

III. CONCLUSION

For the foregoing reasons, the court grants defendants' motion to vacate the court's previous stay and to dismiss all claims in this suit. An appropriate order accompanies this memorandum opinion.

Date: August 16, 2001

Henry H. Kennedy, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL COALITION TO SAVE OUR MALL, et al., **Plaintiffs,** **v.** **GALE NORTON, Secretary of the Interior, et al.,** **Defendants.**	**Civil Action 00-2371 (HHK)**

ORDER AND JUDGMENT

Pursuant to Fed. R. Civ. P. 58 and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 16th day of August, 2001, hereby

ORDERED and ADJUDGED that the complaint in this case is **DISMISSED**.

_____
Henry H. Kennedy, Jr.
United States District Judge

United States Court of Appeals
For the District of Columbia Circuit

No. 01-5290

September Term 2001
00cv02371

Filed on: Feb. 6, 2002

National Coalition to Save Our Mall, et al.,
Appellants

v.

Gale A. Norton, in her official capacity as Secretary of the Interior, et al.,
Appellees

BEFORE: Ginsburg, Chief Judge: Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. Mcgrail
Deputy Clerk

Commemorative Works Act, enacted in 1986, as amended, 40 U.S.C. § 1001 *et seq.*, provides in pertinent part:

Section 1001. Purposes

The purposes of this chapter are as follows:

(a) to preserve the integrity of the comprehensive design of the L'Enfant and McMillan plans for the Nation's Capital;

(b) to ensure the continued public use and enjoyment of open space in the District of Columbia;

(c) to preserve, protect and maintain the limited amount of open space available to residents of, and visitors to, the Nation's Capital; and

(d) to ensure that future commemorative works in areas administered by the National Park Service and the General Services Administration in the District of Columbia and its environs (1) are appropriately designed, constructed, and located and (2) reflect a consensus of the lasting national significance of the subjects involved.

* * *

Section 1007. Site and design approval

(a) Any person authorized by law to establish a commemorative work in the District of Columbia and its environs shall comply with each of the following requirements before requesting the permit for the construction of the commemorative work:

(1) Such person shall consult with the National Capital Memorial Commission regarding the selection of alternative sites and designs for the commemorative work.

(2) Following consultation in accordance with paragraph (1), the Secretary or Administrator (as

appropriate) shall submit, on behalf of such person, site and design proposals to the Commission of Fine Arts and the National Capital Planning Commission for their approval.

(b) In considering site and design proposals, the Commission of Fine Arts, the National Capital Planning Commission and the Secretary and Administrator shall be guided by (but not limited by) the following criteria:

(1) to the maximum extent possible, a commemorative work shall be located in surroundings that are relevant to the subject of the commemorative work;

(2) a commemorative work shall be so located as to prevent interference with, or encroachment upon, any existing commemorative work and to protect, to the maximum extent practicable, open space and existing public use; and

(3) a commemorative work shall be constructed of durable material suitable to the outdoor environment. Landscape features of commemorative works shall be compatible with the climate.

The National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, provides, in pertinent part:

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United Sates shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall –

(A) utilize a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

> (i) the State agency or official has statewide jurisdiction and has the responsibility for such action, (ii) the responsible Federal official furnishes guidance and participates in such preparation,
>
> (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
>
> (iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f , provides as follows:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking.

Federal Advisory Committee Act, 5 U.S.C. App. II, Sec. 10(a), provides, in pertinent part:

§ 10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations minutes; certification; annual report; Federal officer or employee, attendance

(a) (1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, time notice of each such meeting shall be published in the Federal Register, and the Director shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Director may prescribe.

Supreme Court U.S.
FILED
JUL 8 2002
OFFICE OF THE CLERK

No. 01-1622

In the Supreme Court of the United States

NATIONAL COALITION TO SAVE OUR MALL, ET AL.,
PETITIONERS

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Act of May 28, 2001, Pub. L. No. 107-11, 115 Stat. 19, which directs construction of a World War II memorial at the Rainbow Pool site on the National Mall and forecloses judicial review of challenges to its design, location, and construction, violates Article III of the Constitution.

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In the Supreme Court of the United States

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GALE A. NORTON, SECRETARY OF THE INTERIOR,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 269 F.3d 1092. The opinion of the district court (Pet. App. 10a-31a) is reported at 161 F. Supp. 2d 14.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 2001. A petition for rehearing was denied on February 6, 2002. The petition for a writ of certiorari was filed on May 3, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Congress enacted legislation authorizing the construction of a memorial to honor members of the Armed Forces who served in World War II and to commemorate the participation of the United States in that war. Act of May 25, 1993, Pub. L. No. 103-32, 107 Stat. 90. Congress assigned the American Battle Monuments Commission the responsibility to design and construct the memorial. *Ibid.* Congress subsequently enacted legislation authorizing that the memorial be built in "Area I," which encompasses the National Mall and adjoining areas. Act of Jan. 25, 1994, Pub. L. No. 103-422, 108 Stat. 4356.

The American Battle Monuments Commission, the National Capital Planning Commission, and the Commission of Fine Arts (all respondents) approved a site for the memorial at the Rainbow Pool, located between the Washington Monument and Lincoln Memorial. Those three entities subsequently approved a design concept for the memorial. The National Park Service (also a respondent) found that the plan would not have a significant impact on the environment. The Commission of Fine Arts and the National Capital Planning Commission approved the memorial's final design. C.A. Br. 2-4.

Petitioners filed suit in federal district court against respondents, challenging the decisions approving the design, location, and construction of the memorial as a violation of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), the National Capital Memorials and Commemorative Works Act, 40 U.S.C. 1001 *et seq.*, the National Historic Preservation Act, 16 U.S.C. 470f *et seq.*, and the Federal Advisory Committee Act, 5 U.S.C.

App. II, § 10(a). Petitioners sought to enjoin the construction of the memorial. Pet. App. 1a-2a.

While petitioners' suit was pending, Congress enacted the Act of May 28, 2001, Pub. L. No. 107-11, 115 Stat. 19 (Public Law 107-11). That Act directs the expeditious construction of the memorial at the Rainbow Pool site, and further provides that previous decisions approving the site, design, and construction of the memorial shall not be subject to judicial review. *Ibid.* The entire text of the Act is as follows:

> SECTION 1. APPROVAL OF WORLD WAR II MEMORIAL SITE AND DESIGN.
>
> Notwithstanding any other provision of law, the World War II memorial described in plans approved by the Commission of Fine Arts on July 20, 2000 and November 16, 2000, and selected by the National Capital Planning Commission on September 21, 2000 and December 14, 2000, and in accordance with the special use permit issued by the Secretary of the Interior on January 23, 2001, and numbered NCR-NACC-5700-0103, shall be constructed expeditiously at the dedicated Rainbow Pool site in the District of Columbia in a manner consistent with such plans and permits, subject to design modifications, if any, approved in accordance with applicable laws and regulations.
>
> SEC. 2. APPLICATION OF COMMEMORATIVE WORKS ACT.
>
> Elements of the memorial design and construction not approved as of the date of enactment of this Act shall be considered and approved in accordance with

> the requirements of the Commemorative Works Act (40 U.S.C. 1001 *et seq.*).
>
> SEC. 3. JUDICIAL REVIEW.
>
> The decision to locate the memorial at the Rainbow Pool site in the District of Columbia and the actions by the Commission of Fine Arts on July 20, 2000 and November 16, 2000, the actions by the National Capital Planning Commission on September 21, 2000 and December 14, 2000, and the issuance of the special use permit identified in section 1 shall not be subject to judicial review.

§§ 1-3, 115 Stat. 19. Through Public Law 107-11, Congress sought to ensure that "the completed memorial will be dedicated while Americans of the World War II generation are alive." S. Con. Res. 145, 106th Cong., 2d Sess. (2000).

Relying on Public Law 107-11, respondents moved to dismiss petitioners' complaint for lack of jurisdiction. Pet. App. 13a-14a. The district court granted the motion and dismissed petitioners' complaint. *Id.* at 10a-31a.

The court of appeals affirmed. See Pet. App. 1a-9a. The court held that Public Law 107-11 clearly precludes judicial review of the previous decisions approving the location, design, and construction of the memorial. *Id.* at 4a. The court rejected petitioners' contention that the Act's withdrawal of jurisdiction conflicts with *United States* v. *Klein*, 80 U.S. (22 Wall.) 128 (1871). The court reasoned that *Klein* does not disable Congress from changing the law in a way that affects a pending case. Pet. App. 6a-8a.

ARGUMENT

1. Petitioners contend (Pet. 8-10) that Public Law 107-11 conflicts with *United States* v. *Klein*, 80 U.S. (22 Wall.) 128 (1871), because it withdraws federal court jurisdiction over a pending case. That contention is without merit and does not warrant review.

Under the Constitution, Congress has broad power "to define and limit the jurisdiction of the inferior courts of the United States." *Lauf* v. *E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). That power includes the authority to withdraw jurisdiction previously given, and to subject pending cases to the new jurisdictional limitation. As this Court long ago explained, "[t]he Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. * * * And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part; and if withdrawn without a saving clause all pending cases though cognizable when commenced must fail." *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922). Other decisions have applied that basic principle. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) (noting that the Court has "regularly" applied intervening jurisdictional limitations to pending cases); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (noting that the Court has "consistently" adhered to the rule that "when a law conferring jurisdiction is repealed without any reservations as to pending cases, all cases fall within the law"); *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) (holding that "[j]urisdiction in such cases was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inas-

much as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress.").

Under those cases, Congress's withdrawal of federal court jurisdiction to review challenges to the decisions approving the location, design, and construction of the World War II memorial does not raise any constitutional issue under Article III. Instead, it falls well within Congress's recognized authority to withdraw jurisdiction from the lower federal courts and to direct the application of the new jurisdictional limitation to pending cases.

Moreover, in this case, Congress's power to limit the jurisdiction of the lower federal courts is augmented by its authority under the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, to "make all needful Rules and Regulations respecting the * * * Property belonging to the United States." Under the Property Clause, Congress has plenary authority to control the use of public land. See *Kleppe* v. *New Mexico*, 426 U.S. 529, 531-533 (1976). That authority necessarily encompasses the power to direct the construction of a World War II memorial at the Rainbow Pool site, to displace federal statutes that might otherwise serve as an obstacle to that directive, and to shield the previous decisions approving the location, design, and construction of the memorial from judicial review.

Furthermore, as the court of appeals observed (Pet. App. 7a-8a), the injunctive remedy sought by petitioners is particularly susceptible to displacement by Congress. For example, if petitioners had prevailed in the district court and obtained an injunction against the memorial's construction, Congress would have been free under *Miller* v. *French*, 530 U.S. 327, 348-350 (2000), and *Pennsylvania* v. *Wheeling & Belmont*

Bridge, 59 U.S. (18 How.) 421 (1855), to provide for the memorial's construction and to require a federal court to vacate any outstanding injunction preventing it. Through Public Law 107-11, Congress has taken the less intrusive step of foreclosing judicial review of objections to the memorial's construction in the first place.

Petitioners nonetheless contend (Pet. 8-10) that Public Law 107-11 conflicts with *Klein*. Petitioners' reliance on *Klein* is misplaced. In that case, Klein, the executor of an estate, sought to recover the value of property seized by the United States during the Civil War. The executor relied on a statute that authorized such a recovery upon proof that the decedent did not give aid and comfort to the enemy. In *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870), this Court had held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and that if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. This Court held that the statute "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (22 Wall.) at 147. The Court explained that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146. The Court further concluded that Congress had exceeded its authority by changing the effect of a Presidential pardon that had previously been granted. *Id.* at 148.

Klein does not hold that Congress lacks authority to withdraw a court's jurisdiction and apply that jurisdictional limitation to a pending case. Rather, *Klein*

condemned a statutory withdrawal of jurisdiction that impermissibly invaded the President's pardon power and had as its predicate a rule of decision that required the courts to give an effect to a Presidential pardon that was contrary to the effect that this Court had already decided that such a pardon should have. Public Law 107-11 does not have any such defects. Moreover, "[w]hatever the precise scope of *Klein*, * * * later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). In Public Law 107-11, Congress amended applicable law, directing the construction of the memorial at the Rainbow Pool site "[n]otwithstanding any other provision of law," and foreclosing judicial review of certain objections to the memorial's construction. §§ 1, 3, 115 Stat. 19. *Klein* is therefore inapposite here.

2. Petitioners also contend (Pet. 11-14) that Public Law 107-11 does not withdraw jurisdiction to review challenges to the location, design, and construction of the memorial that are based on procedural laws, such as the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* That contention does not appear to fall within the question that petitioners have presented for review. See Pet. i. In any event, that contention is without merit and does not warrant review.

The text of Section 3 of Public Law 107-11 does not draw any distinction between procedural and substantive challenges. Instead, it categorically forecloses all judicial challenges to the previous decisions approving the design, location, and construction of the memorial. See § 3, 115 Stat. 19. Foreclosing procedural as well as substantive challenges also facilitates Congress's

directive in Section 1 that the memorial shall be constructed at the Rainbow Pool site "[n]otwithstanding *any* other provision of law." § 1, 115 Stat. 19 (emphasis added). Barring all challenges also furthers Congress's goal of seeking to ensure that the memorial will be constructed while Americans of the World War II generation are still alive. The court of appeals therefore correctly concluded that Public Law 107-11 forecloses judicial consideration of petitioners' challenges to the location, design, and construction of the memorial. Further review of that question is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

NATIONAL COALITION TO SAVE OUR MALL,
WORLD WAR II VETERANS TO SAVE THE MALL,
COMMITTEE OF 100 ON THE FEDERAL CITY,
AND D.C. PRESERVATION LEAGUE,

Petitioners,

v.

GALE NORTON, SECRETARY,
U.S. DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE, COMMISSION OF FINE ARTS,
NATIONAL CAPITAL PLANNING COMMISSION, AND
AMERICAN BATTLE MONUMENTS COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY

The National Coalition to Save Our Mall, World War II Veterans to Save the Mall, Committee of 100 on the Federal City, and D.C. Preservation League hereby reply to the opposition filed by the Federal Respondents Gale Norton, Secretary of the Interior, *et al.*, to the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on November 6, 2001.

ARGUMENT

1. The Federal Respondents attempt to characterize Petitioners' argument as being a challenge to Congress' plenary authority to enact legislation that confers, limits, or removes the jurisdiction of the federal courts, or to amend the substantive laws that were the basis for Petitioners' lawsuit. As Petitioners now discuss, Section 3 of Public Law 107-11 goes beyond the constitutionally-permissible functions of defining the jurisdiction of the federal courts or amending federal laws. Instead, Public Law 107-11 decided Petitioners' pending case by retroactively stripping the jurisdiction of *all* courts (state and federal) over the case. As a result, this law prevents the courts from applying the new law to decide Petitioners' case, in violation of the principle of separation of powers set forth in *United States v. Klein*, 80 U.S. 128 (1872).

Respondents cite a number of cases standing for the general proposition that Congress has broad power both to control the use of public land, *Kleppe v. New Mexico*, 426 U.S. 529, 531-33 (1976), and "to define and limit the jurisdiction of

the inferior courts of the United States." *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *see also Kline v. Burke Construction Co.*, 260 U.S. 226 (1922). However, it is equally clear that Congress may not violate other constitutional provisions in exercising this plenary authority. *See* Sager, Lawrence Gene, "Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17, 37 (1981).

The question is not whether Congress has the power to define the jurisdiction of the federal courts. Rather, the question is whether Congress can interject itself into Petitioners' pending lawsuit challenging the decisions approving the World War II Memorial, and strip any and all courts (state or federal) of jurisdiction over that case by retroactively stating that those decisions "shall not be subject to judicial review." Public Law 107-11, § 3. None of the cases cited by Respondents supports the notion that Congress' power to define the jurisdiction of the federal courts encompasses the power to enact legislation whose sole purpose is to strip the courts of jurisdiction over a pending case, which was the fact pattern found to impermissibly encroach upon the essential function of the judiciary in *United States v. Klein*.

For example, in *Lauf v. E.G. Shinner & Co.*, this Court simply acknowledged that the federal courts had only the remedial powers conferred by Congress, and therefore a federal court exceeded its jurisdiction by issuing an injunction against certain union activities that were protected by federal labor laws. Likewise in *Kline v. Burke Construction Co.*, the court held that a federal court had no authority to enjoin a pending action in state court involving the same case or controversy, since the state case did not impair or defeat the federal court's jurisdiction.

Notably, in *Kline*, an alternative venue was available in state court for the adjudication of the dispute in question, and *Lauf* involved only a limitation on the remedial powers of the federal court, and not its jurisdiction over the entirety of the case. Neither *Lauf* nor *Kline* involved any question concerning the effect on a pending case of congressional legislation changing the jurisdiction of the federal courts, much less the effect of congressional legislation enacted for the sole purpose of disposing of a pending case.

Respondents also rely on a series of cases addressing whether a congressional statute will be given retroactive effect. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Bruner v. U.S*, 343 U.S. 112 (1952); and *Assessors v. Osbourne*, 76 U.S. (9 Wall.) 567 (1869). However, none of these cases addresses a situation such as the instant case, in which Congress has passed a law whose sole purpose is to oust jurisdiction over a pending case. Rather, those cases involved congressional statutes that repealed the laws that were the substantive basis for jurisdiction. Here, of course, Section 3 of Public Law 107-11 does not purport to repeal any of the substantive laws that were the basis for Petitioners' action. Instead, Public Law 107-11 deprives the courts of jurisdiction over a challenge to the agency decisions approving the World War II Memorial arising under any law.

For example in *Landgraf v. USI Film Products*, this Court held that a 1991 law creating a right to recover compensatory and punitive damages for certain violations of the Civil Rights Act of 1964 was not applicable to a case pending on appeal at the time the new law was passed. Thus, that case did not involve legislation that even limited, much less removed, the jurisdiction of the court over a pending case. While *dicta* in *Landgraf* acknowledged the rule that a change in jurisdictional rules will be retroactively applied to a pending case, the Court

was careful to explain that such a change "usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Landgraf*, 511 U.S. at 274. That is obviously not the case here, since Public Law 107-11 eliminates the jurisdiction of any and all courts from hearing Petitioners' case.

None of the other cases cited by Respondents deal with a situation where a jurisdictional change eliminates a cause of action altogether. For example, in *Bruner v. U.S.*, this Court held that an amendment to the Tucker Act, which limited the jurisdiction of the federal district courts over suits to recover compensation brought by employees of the United States, barred a pending lawsuit filed in the district court by an employee of the United States. Congress made clear, however, that jurisdiction for claims such as those brought in the *Bruner* case was still available in the Court of Claims. Thus, unlike the present case, the statute involved in *Bruner* was not specifically passed by Congress to strip any and all courts of jurisdiction to hear challenges to a particular action that was the subject of a pending lawsuit.

Likewise, in *Assessors v. Osbourne*, Congress repealed a statute conferring jurisdiction on the federal courts over suits arising over the collection of federal taxes, thereby requiring the federal court to dismiss a pending action arising over the collection of federal taxes. Again, however, as was the case in *Bruner*, Congress did not preclude such actions altogether; instead, the intent of the legislation was that such actions should be brought in state court.

Here, however, Public Law 107-11 does not repeal or amend any of the substantive federal laws that provided the federal question jurisdiction for Petitioners' challenge to the World War II Memorial, nor does it provide for an alternative venue for such challenges. Rather, the legislation seeks to

insulate specific agency decisions approving the location and design of the World War II Memorial from all judicial review after-the-fact, by stripping any court (state or federal) from exercising jurisdiction over challenges to these completed decisions. This is precisely the sort of congressional action found to violate separation of powers principles in *United States v. Klein*. None of the cases cited by Respondents sanction jurisdictional changes that are intended to oust any and all courts from jurisdiction over a pending case as a means of depriving litigants of *any* forum for judicial review of a specific controversial governmental decision.

Respondents next cite *Miller v. French*, 530 U.S. 327 (2000) for the notion that since Congress would have had the authority to suspend any injunction issued by the district court, Congress must necessarily also possess the authority to strip the courts of jurisdiction over the case altogether. Brief for the Federal Respondents in Opposition, at 6-7. However, this is not a fair reading of *Miller v. French*.

The congressional legislation in *Miller v. French* developed new standards governing the entry of injunctive relief in litigation concerning prison conditions. In addition, the new law provided for an automatic stay of any prior injunctive decree entered in such litigation for a 30 to 90 day period while the court determined whether the prior injunction satisfied the new standards. The Court held that the temporary displacement of a remedial order did not violate separation of powers principles set forth in *United States v. Klein*, reasoning that "the entry of the stay does not . . . divest the court of authority to decide the merits of the termination motion." *Id.* at 348.

Accordingly, *Miller v. French* does not support Respondents' attempt to equate legislation that temporarily displaces a remedial order, which was found not to present

separation of powers problems, with legislation that stripped the courts entirely of jurisdiction over a pending case, which is what occurred in both *United States v. Klein*, and in this case. Indeed, Justice Souter specifically stated in his concurring opinion, also joined by Justice Ginsburg, that the legislation *would* implicate separation of powers concerns if the post-stay period was an insufficient time frame for the court to determine whether the injunction satisfied the new standard. *Miller v. French*, 530 U.S. at 351 (Souter, J., concurring in part and dissenting in part).

Likewise, in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 403 (1980), the Court found that legislation conferring jurisdiction in the Court of Claims over certain Indian claims and waiving the *res judicata* effect of a prior judgment did not raise separation of powers concerns, because the Court of Claims "was left completely free to reaffirm its" prior judgment, based on its review of the facts and law. *Id.* at 407. Here, by contrast, Section 3 of Public Law 107-11 stripped the district court of jurisdiction over Petitioners' pending case, and completely foreclosed the judicial branch from asserting any role in interpreting or implementing the laws of Congress, including Public Law 107-11 itself.

Respondents' suggestion that the holding in *United States v. Klein* should be limited only to situations where congressional legislation encroaches on the President's pardon power is without support. Brief for Federal Respondents in Opposition, at 7-8. Both the majority as well as the concurring and dissenting opinions in *Miller v. French* make clear that the separation of powers flaw of the legislation at issue in *Klein* does not rest on the facts of that case involving the Presidential pardon power. *Miller v. French*, 530 U.S. at 348-52. *See also United States v. Sioux Nation of Indians*, 448 U.S. at 403 (making clear that the encroachment on the presidential pardon

power was a constitutional concern that was separate and independent from separation of powers concerns). Rather, the constitutional flaw in *Klein* was Congress' attempt to prescribe a rule of decision, the sole purpose of which was to dispose of a pending case without permitting the Court to rule on the scope or effect of the change in legislation.

Finally, as noted in the petition for certiorari, *Pennsylvania v. Wheeling and Belmont Bridge*, 59 U.S. 421 (1855), *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *Robertson v. Seattle*, 503 U.S. 429 (1992), cited by Respondents, are inapposite here. The actions involved in those cases were straightforward changes in the applicable law, which, when applied to pending cases, affected the appropriateness of previously-entered judicial decrees or resulted in the dismissal of the case altogether. Nonetheless, in each of these cases, the Courts still maintained jurisdiction necessary to permit the courts to interpret and apply the new law to the facts of the pending cases.

Here, of course, Public Law 107-11 went beyond simply amending the various laws applicable to the World War II Memorial; it also divested the courts of jurisdiction over Petitioners' pending case so that no court now has jurisdiction to apply the change in law to the facts in that case. As a result, Congress has usurped the Court's essential judicial function in contravention of the principles requiring separation of legislative and judicial powers established in *United States v. Klein*.

2. Respondents erroneously characterize the petition as arguing that "Public Law 107-11 does not withdraw jurisdiction to review challenges to the location, design and construction of the [World War II] memorial that are based on procedural laws, such as the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*" Brief for the Federal Respondents In Opposition,

at 8. As the petition plainly points out, Section 3 of Public Law 107-11 does indeed withdraw the court's jurisdiction over the entirety of the claims in Petitioners' lawsuit, including the claims based on procedural laws such as the National Environmental Policy Act (NEPA).

Whether Public Law 107-11, apart from Section 3's categorical elimination of jurisdiction, intended by Section 1 to exempt the World War II Memorial from laws such as NEPA is an unresolved interpretative issue that, as Respondents correctly point out, is not within the question Petitioners presented for review. The point here is that Congress, by coupling Section 1's qualified amendment to the substantive law applicable to the World War II Memorial with Section 3's complete withdrawal of federal jurisdiction over Petitioners' pending case, has barred the courts from interpreting the scope of Section 1 to resolve what laws or regulations were intended to remain applicable to the Memorial. In doing so, Congress' attempt to eliminate a controversial lawsuit challenging the lawfulness of agency actions approving the World War II Memorial has unconstitutionally crossed the line that separates the legislative and judicial functions.

CONCLUSION

The petition for a writ of certiorari should be granted.

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July 18, 2002